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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

C.L.,

Petitioner,

v.

THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY,

Respondent;

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

E063496

(Super.Ct.No. J250615)

OPINION

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Annemarie G.

Pace, Judge. Petition denied.

Gloria Gebbie for Petitioner.

No appearance for Respondent.

Jean-Rene Basle, County Counsel, Adam E. Ebright, Deputy County Counsel, for
Plaintiff and Respondent.

Petitioner C.L. (father) has filed a petition for extraordinary writ pursuant to California Rules of Court, rule 8.452, challenging the juvenile court's order denying his petition under Welfare and Institutions Code section 388.¹ For the reasons set forth *post*, we deny father's writ petition.

FACTUAL AND PROCEDURAL HISTORY

M.N. (minor, born April 2007) and two of his half siblings, who are not subjects of this writ, came to the attention of San Bernardino Children and Family Services (CFS) on July 12, 2013, based on a 10-day referral alleging general neglect and physical abuse in the home of their mother, T.N. (mother).² At the time, father's whereabouts were unknown.

A social worker prepared a section 300 petition on behalf of minor alleging, as to father, failure to protect under section 300, subdivision (b), and no provision for support under section 300, subdivision (g). At the detention hearing, the court found a *prima facie* case that minor came under section 300 and ordered weekly visitation.

The social worker prepared a jurisdictional/dispositional report dated August 28, 2013, recommending reunification services for mother. The social worker interviewed mother and discovered that mother had not heard from father for several years. An inmate location search indicated that father was incarcerated. Mother reported that father never lived with the family. Father was not listed on minor's birth certificate and never

¹ All further statutory references will be to the Welfare and Institutions Code, unless otherwise noted.

² Mother is not a party to this writ.

provided support for minor. The social worker reported that when she interviewed minor, he did not appear to know anything about his father or recognize father's name.

The social worker categorized mother's most significant problems as her mental health condition and her addiction to abusive men. Mother admitted that she had been diagnosed with bipolar disorder. She gave varying statements regarding her children's parentage but claimed to have conceived seven or eight children between four to seven different men. Mother appeared to have new relationships with men in three-month cycles and did not seem to understand the risk her behavior had on her children. Mother opined that father was a good man whom she would like to date again, while at the same time lamenting that he might have already been killed because of his gang affiliation and history of selling drugs.

At the August 28, 2013, jurisdictional/dispositional hearing, father was appointed counsel and the matter was continued to September 30, 2013, so father could be noticed properly and his attorney could contact him. Father was personally served on September 11, 2013, and was noticed for the further jurisdictional/dispositional hearing scheduled for September 30th. On September 30, 2013, the matter was continued again to October 21, 2013. Father's counsel informed the court that father was no longer in custody and his whereabouts were unknown. As to jurisdiction, father's counsel objected but offered no affirmative evidence. The court found two section 300 allegations true as to father and found that minor came under section 300, subdivision (b). The court ordered reunification services for mother but found father to be an alleged father, not entitled to services.

Father was not present at the six-month review hearing held on April 21, 2014. He waited to make his first appearance in the matter at the 12-month review hearing on October 7, 2014. During this time, mother continued to receive reunification services and minor was placed with a maternal cousin along with minor's two half siblings. Father's counsel submitted on the social worker's recommendations and informed the court that she would be filing a petition on father's behalf after the hearing. The court ordered reunification services for mother and ordered weekly visitation for both parents.

On December 22, 2014, father filed a section 388 petition challenging his alleged father status and requesting presumed father status. Father alleged that he holds minor out as his son and that he received a DNA test in 2007 or 2008 indicating that he was minor's biological father.

Meanwhile, minor's placement with maternal aunt failed due to physical abuse allegations; the social worker prepared a new detention report recommending a more restrictive placement in a foster home. On January 5, 2015, the court held a detention hearing and approved the new placement for minor and his half siblings.

The social worker prepared a status review report dated February 2, 2015, recommending termination of reunification services to mother and setting of a section 366.26 hearing to establish a permanent plan. After 18 months of services, mother continued to test positive for marijuana and methamphetamine, indicating that she had not benefitted from the services provided. The social worker interviewed father and reported that he was interested in obtaining custody of minor. The social worker,

however, noted that father was incarcerated until the time the dependency commenced and had never been involved in minor's life.

The social worker also filed an addendum report dated February 2, 2015, in response to father's section 388 petition. The social worker recommended that father's petition be denied because father had not provided any evidence of his relationship with minor. Father confirmed that minor never lived with him and he had never financially provided support for minor. Father, however, claimed that he visited minor on several occasions since his release from prison. Father reported that he had been in and out of jail throughout minor's life but that after his release in 2008, child support services made him take a DNA test; it confirmed father's paternity. Father did not have a copy of the DNA test and there was no reported test in the C-IV automated welfare system database. The social worker, therefore, was unable to verify father's claims.

At the February 2, 2015, hearing, the court continued the section 366.22 hearing and the jurisdictional/dispositional hearings to perfect notice for minor's half sibling. The court also ordered paternity testing for father and continued his section 388 petition. Counsel for CFS informed the court that because of the 18-month time frame, the DNA test would not change the outcome of the case. Father had already been denied services, he was incarcerated most of minor's life, and he had not shown that he was rehabilitated in any way.

On April 28, 2015, the social worker reported that the 2008 DNA test had been obtained and it confirmed that father was minor's biological father. However, the social

worker opined that it was not in minor's best interest to provide reunification services to father.

Mother and father were both present for the combined jurisdictional/dispositional and section 366.22 hearing on April 28, 2015. Father called the social worker as a witness to discuss the change in recommendation for reunification services. The social worker explained that based solely on his initial interview with father, he tentatively thought reunification services could be beneficial. After speaking with the assigned social worker about the case, however, they came to the conclusion that services would not be in the best interest of minor. The social worker also confirmed that father was never married to mother, his name was not on the birth certificate, he never lived with minor, and he was incarcerated when he discovered mother was pregnant with minor.

Father testified that he considered himself as minor's father and that minor called him "Dad." Father claimed that he had been visiting minor since father got out of prison. When the court tried to clarify this timeline, father became evasive and claimed that he visited minor a "million" times. Mother also briefly took the stand to explain that many of these visits would have been before the dependency proceedings.

In closing argument, father's counsel acknowledged that father was never married to mother but argued that he was involved in minor's life "quite a bit for a gentleman in his situation." Citing the Family Code, counsel for CFS argued that father had not met his burden to show that his status should be elevated to presumed father status: father was not on the birth certificate, father was not married to mother, and there was no evidence showing that father had received minor into his home. Moreover, CFS argued

that father was not a *Kelsey S.*³ father who had immediately come forward after learning about the child. Father had received notice of the dependency proceedings in September 2013, and knew about the DNA test since 2008. Nonetheless, father sat on his rights without coming forward until October 2014. Finally, turning to the Welfare and Institutions Code section 388 petition, CFS argued that even if father were given presumed status, the time for services had already expired and there was no change in circumstance because father received notice throughout the proceedings.

The juvenile court found that, although father may have held minor out as his child, father could not elevate his status to presumed father because he had not met his requirements under Family Code section 7611, in that he never received minor into his home, he paid no child support, and he was not on the birth certificate. The court denied father's Welfare and Institutions Code section 388 petition; it found no change in circumstances because father had known about minor since birth without coming forward as his father. The court then terminated reunification services as to mother, and set a Welfare and Institutions Code section 366.26 hearing to select a permanent placement plan.

DISCUSSION

In his writ petition, father challenges the juvenile court's order denying his section 388 petition. Father's "position is that the court erred in failing to grant his requests as

³ *Adoption of Kelsey S.* (1992) 1 Cal.4th 816.

presented in his 388 petition specifically that he be declared the presumed father of [minor] and that he be granted custody or services to obtain custody of his son.”

“Section 388 allows a person having an interest in a dependent child of the court to petition the court for a hearing to change, modify, or set aside any previous order on the grounds of change of circumstance or new evidence.” (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) “[S]pecific allegations describing the evidence constituting the proffered changed circumstances or new evidence’ is required.” (*Ibid.*) It “shall set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order or termination of jurisdiction.” (§ 388, subd. (a).) “‘There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.]’” (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079, 1081 [Fourth Dist., Div. Two] [summary denial of § 388 petition was proper where there was no showing of how the children’s best interests would be served by depriving them of a permanent stable home in exchange for an uncertain future].)

We review the juvenile court’s denial of a section 388 petition for abuse of discretion. (*In re Anthony W., supra*, 87 Cal.App.4th at p. 250.) A section 388 petition is addressed to the sound discretion of the juvenile court, and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

A. FATHER FAILED TO PRESENT NEW EVIDENCE

The first issue we must address is whether father demonstrated “a genuine change of circumstances or new evidence.” (*In re C.J.W.*, *supra*, 157 Cal.App.4th at p. 1081.) In this case, in the section 388 petition filed on December 22, 2014, father challenged the court’s order dated October 21, 2013, wherein the court found father was an alleged father and ordered no reunification services to him. Father argued the following as changed circumstances: That he had been incarcerated at the time of the original removal of minor and was not present in court when the original findings and orders were made; he was out of custody and had been released from probation and/or parole; prior to his release, he completed a domestic violence class; he had employment and an apartment adequate to care for minor and his 14-year-old son living with him; father held minor out as his son; he spoke with minor by phone several times a week; minor told father that he loved father; and father took a DNA test in 2007/2008, which determined father’s paternity.

On January 28, 2015, CFS filed a response to the section 388 petition. The social worker reported that he spoke with father on January 22, 2015. At that time, father told the social worker that he had been out of jail for about a year and a half after serving a one-year sentence for a domestic violence incident. Father also reported having a job and securing an apartment. Father acknowledged that minor never resided with him and that father had never financially supported minor. At the time of the report, father’s DNA test results from 2008 could not be verified.

We note that father was personally served and noticed on September 11, 2013. He was required to act with reasonable diligence to present evidence to the court and/or provide a satisfactory explanation as to why he waited until the 12-month hearing on October 7, 2014, over one year after he was personally served on this matter, to appear for the first time. Then, waited another two and a half months before filing his section 388 petition, approximately 16 months after he became aware of the dependency proceedings. Moreover, although he may have been in custody when he was initially served, he could have appeared in the case while in custody, or he could have appeared once he was released soon thereafter. Furthermore, as to the results of the DNA test, father, as far back as 2007 or 2008, knew this evidence. He cannot claim that all this evidence was “new” at the time of the jurisdictional/dispositional hearing held on October 21, 2013. (See *In re H.S.* (2010) 188 Cal.App.4th 103, 105.)

Belated presentation of evidence does not render the evidence new; father, who had been properly served and noticed, was required to act with reasonable diligence to present the evidence to the court and/or provide a satisfactory explanation as to why he waited until the 12-month hearing to appear for the first time, and then waited another two and a half months before filing his section 388 petition. (*In re H.S.*, *supra*, 188 Cal.App.4th at pp. 108-110.)

At the hearing on the petition, the court stated that father’s section 388 petition “does not allege changed circumstances. [¶] [T]his is not a *Kelsey S.* situation where [father] was prohibited from knowing about the child and prevented from seeing the child. He’s known about the child since birth, met him since he was one year old. And to come

in at this late stage of this case and say there are changed circumstances simply is not true.”

Based on the facts summarized *ante*, we cannot say that the juvenile court abused its discretion in its ruling on father’s motion.

B. FATHER’S PETITION FAILS ON THE MERITS

Father contends that the juvenile court erred in failing to declare father as a presumed father of minor. Father argues that the Stipulation for Judgment Regarding Parental Obligations and Judgment under Family Code section 7611 elevates him to presumed father status in a dependency proceeding. In support of his contention, father cites to *In re Christopher M.* (2003) 113 Cal.App.4th 155. That case is inapposite.

In *In re Christopher M.*, *supra*, 113 Cal.App.4th 155, the holding dealt only with the notice provisions of section 316.2 as it affects the competing interests of an alleged father against another man who has been declared to be the presumed father pursuant to a voluntary declaration of paternity. There, the court concluded that the provisions of section 316.2 for inquiring about paternity and providing notice to alleged fathers did not apply after paternity was established. (*Christopher M.*, at p. 164.)

In dependency proceedings, however, the purpose of Family Code section 7611 is not to establish paternity. Instead, the purpose is to determine whether the alleged father has demonstrated a sufficient commitment to his paternal responsibilities to be afforded rights not afforded to natural fathers. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 804.) A paternity judgment, standing alone, does not entitle a man to presumed father status. The man who holds a judgment of paternity must also show that he promptly came forward

and demonstrated a full commitment to paternal responsibilities—emotional, financial, and otherwise. (*In re Cheyenne B.* (2012) 203 Cal.App.4th 1361, 1376.) “Nowhere in [Family Code] section 7611 or in the case law interpreting that section does it state that a prior paternity judgment requires a trial court to find the holder of such judgment must *thereby* be a presumed father. (*In re Margarita D.* (1999) 72 Cal.App.4th 1288, 1296, 1298) In our view, requiring a man who holds a judgment of paternity to also satisfy the requirements necessary to be considered a presumed father, with its attendant rights and obligations, does not constitute a redetermination of paternity. Instead, it is a determination of the extent, nature and quality of his relationship with the child at issue.” (*Id.* at p. 1376.)

In this case, father failed to demonstrate the type of commitment required to be declared a presumed father. Father was incarcerated at the time the detention of minor was commenced and had been incarcerated on and off throughout minor’s life. Mother indicated that father had a gang affiliation and a history of dealing in drugs. The social worker reported that when she initially interviewed minor, he did not appear to know anything about father or recognize father’s name. Father confirmed that minor never lived with him and that he never financially supported minor.

Therefore, father did not demonstrate a sufficient commitment to his parental responsibilities. The fact that he signed a stipulation for judgment does not automatically entitle him to presumed father status.

Moreover, in a related argument, father contends that the court should have declared him a presumed father under Family Code section 7611, subdivision (d),

because he held minor out as his own. In making this argument, father attempts to side-step the added statutory requirement of taking minor into his home: “Father’s second contention is that . . . he falls within (d) of that section because he openly holds this child out as his own and circumstances prevented him from receiving this child into his home.” Notwithstanding, subdivision (d) of Family Code section 7611, does not state “receive the child into his home IF he can.” Instead, it states: “The presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.”

At the hearing on the petition, the juvenile court specifically addressed the requirements of Family Code section 7611, subdivision (d), and found that father could not elevate his parental status because he never received minor into his home, he paid no child support, and he was not named on the birth certificate. The social worker testified that father was never married to mother, he was not named on the birth certificate, he never lived with minor, and he was incarcerated when he discovered that mother was pregnant. Even in his writ petition, father acknowledged that minor never lived in his home. During the dependency proceedings, father failed to assert his paternity notwithstanding his knowledge of the paternity test since 2008, and having notice of the dependency hearings since September 2013. Instead, as noted *ante*, he sat on his rights for approximately 16 months before coming forward and claiming to be a presumed father of minor.

Based on the facts set forth *ante*, we discern no abuse of discretion in the juvenile court’s finding that father failed to raise himself to presumed father status. Accordingly, the court properly denied father’s section 388 petition.

DISPOSITION

The writ petition is denied.

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MILLER
J.

We concur:

KING
Acting P. J.

CODRINGTON
J.